DAVID F. NESS
Assistant Federal Defender
Federal Defenders of Montana
104 2nd Street South, Suite 301
Great Falls, Montana 59401
david_ness@fd.org
Phone: (406) 727-5328
Fax: (406) 727-4329

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA, Plaintiff/Respondent, vs. YURI CHACHANKO, Defendant/Movant.	**Case No. CR-05-52-BLG-RFC-01** **DEFENDANT/MOVANT'S REPLY TO GOVERNMENT'S MOTION TO DISMISS AND REPONSE TO MOTION UNDER 28 U.S.C. § 2255**

The Defendant/Movant, Yuri Chachanko, through Counsel David F. Ness and the Federal Defenders of Montana, respectfully submits the following Reply to the Government's Motion to Dismiss and Response to Defendant's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255.

I. Introduction

On June 21, 2016, the Defendant/Movant, Yuri Chachanko, filed a 28 U.S.C. § 2255 motion seeking to vacate and set aside his conviction for possessing a firearm in violation of 18 U.S.C. § 924(c) in light of *Johnson v. United States,* 135 S.Ct. 2551 (2015). (Motion to Vacate, doc. 93). The Government filed a Response on July 26, 2016. (Response, doc. 98).

In its Response, the Government has argued: (1) that Chachanko's claim is barred by the statute of limitations because *Johnson* does not impact § 924(c); (2) that Chachanko is procedurally barred from attacking his conviction in a § 2255 proceeding because his *Johnson* claim could have been raised on direct appeal; (3) that Chachanko's claim lacks substantive merit because Hobbs Act robbery is a crime of violence under § 924(c)'s force clause; and (4) that § 924(c)'s residual clause is not unconstitutionally vague. These arguments are addressed below.

II. Argument

A. Chachanko's § 2255 motion is timely because it was filed within one year of the Supreme Court's decision in *Johnson v. United States.*

The AEDPA sets forth four potential dates for the commencement of its one-year statute of limitations. In this case, only two of those dates are at issue: (1) the date on which the judgment became final and (2) the date on which the right asserted was newly recognized and made retroactively available to cases on collateral review. *See,* 28 U.S.C. § 2255(f)(1) and (3). Chachanko maintains that the statute of limitations began to run on the latter of these two dates, which in his case is June 26, 2015, the day the United States Supreme Court issued its decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015). *See,* 28 U.S.C. § 2255(f)(3).

The Government, on the other hand, has argued that the statute of limitations began to run on the first date – the day on which Chachanko's conviction became final which, according to its calculation, would have been sometime in August of 2007. *See,* 28 U.S.C. § 2255(f)(1). It maintains that § 2255(f)(3) does not apply in this case because "Chachanko's claim does not implicate a right initially recognized in *Johnson*." (Response, doc. 98 at 4). Although it generally concedes that *Johnson* announced a "new rule" that is retroactive to cases on collateral review, it urges a narrow application of its holding. It maintains that an extension of *Johnson* to cover § 924(c) would require a "new rule" that can only be announced by the Supreme Court. The Government's argument rests on a misunderstanding of the retroactivity principles underlying § 2255(f)(3).

In determining whether a Supreme Court decision announced a "new rule" that applies retroactively for purposes of § 2255(f)(3), courts apply the retroactivity analysis enunciated in *Teague v. Lane*, 489 U.S. 288 (1989), the case that produced "the framework for determining whether a new rule applies to cases on collateral review." *Id.* at 1264. In *Teague,* the Court held, as general matter, "that new constitutional rules of criminal procedure" are not applicable to cases on collateral review. *Teague,* 489 U.S. at 310. *Teague*'s rule does not, however, apply to two categories of decisions – those that announce "new substantive rules" and those that announce new "watershed rules of criminal procedure." *Id.* at 307, 311-313.[1]

"A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). Substantive rules include "decisions that narrow the scope of a criminal statute by interpreting its terms, as well as determinations that place particular conduct or persons covered by the statute beyond the State's power to punish. *Schriro,* 542 U.S. at 351-52; *Montgomery v. Louisiana,* 136 S.Ct. 718, 730 (2016).

"Procedural rules, by contrast, are designed to enhance the accuracy of a conviction or sentence by regulating 'the manner of determining the defendant's culpability.'" *Montgomery,* 136 U.S. at 730. "They do not produce a class of persons convicted of conduct the law does not make criminal" or "necessarily carry a significant risk that a defendant faces a punishment that the law cannot impose upon him." *Welch*, 136 U.S. at 1265; *Montgomery,* 136 U.S. at 724.

In *Welch v. United States*, 136 S.Ct. 1257 (2016), the Supreme Court relied on *Teague*'s framework to support its conclusion that *Johnson* announced a "substantive

[1] Chachanko concedes that *Johnson* did not produce a new "watershed rule of criminal procedure." *See, Welch v. United States,* 136 S.Ct. 1257, 1264 (2016).

rule that has retroactive effect in cases on collateral review." *Id.* at 1268. In coming to this conclusion, the Court explained that *Johnson* is not a procedural decision because "it has nothing to do with the range of permissible methods a court might use to determine whether a defendant should be sentenced under the Armed Career Criminal Act" – it "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied." *Id.* at 1265; *see also, Bousley v. United States*, 523 U.S. 614, 620 (1998)(holding that the rule established in *Bailey v. United States,* 516 U.S. 137 (1995), was substantive because it limited the reach of § 924(c)); *Schriro*, 542 U.S. at 354 ("A decision that modifies the elements of an offense is normally substantive rather procedural.").

The Government concedes, as it must, what *Welch* confirmed – that *Johnson* announced a new rule that is retroactive to cases on collateral review. It maintains, however, that Chachanko's § 2255 motion is untimely because the rule in *Johnson* does not extend to § 924(c). The Government's argument is premised on three misconceptions – (1) that because *Johnson* did not specifically discuss § 924(c), its holding cannot be logically construed to apply to that statute's residual clause; (2) that extending *Johnson*'s holding to § 924(c) would create a new rule of constitutional law; and (3) that only the Supreme Court can decide whether the rule in *Johnson* applies retroactively to § 924(c) context. These claims, like the

Government's ultimate argument, are based on a misunderstanding of federal law.

With regard to the first claim, it cannot be credibly argued that *Johnson* is limited to ACCA cases. The Government, itself, has conceded that *Johnson* applies to the sentencing guidelines' residual clause. *See, United States v. Torres*, ___ F.3d ___, 2016 WL 3770517 at *9 (9th Cir., July 14, 2016)(accepting Government's concession "that *Johnson*'s holding nullifies § 4B1.2(a)(2)'s identically worded residual clause"). It has also expressed the belief that the reasoning in *Johnson* applies outside the ACCA context to other federal statutes, including 18 U.S.C. § 924(c)(3)(B).[2] Most importantly, however, the Ninth Circuit, in *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), has extended *Johnson*'s reasoning to § 16(b)'s residual clause, which is identical to that in § 924(c). *See also, United States v. Hernandez-Lara*, 817 F.3d 651 (9th Cir. 2016). As discussed more fully below, *Dimaya* compels the conclusion that *Johnson* applies to § 924(c)(3)(B)'s residual clause. *See, e.g., United States v. Bell*, 2016 WL 344749 (N.D. Cal. 2016); *United States v. Lattanaphom*, 2016 WL 393545 (E.D. Cal. 2016); *United States v. Luong,* 2016 WL 1588495 (E.D. Cal. 2016); *United States v. Edmundson*, 2015 WL 9311983 (D. Md. 2016); *United States v. Baires-Reyes*, 2016 WL 3163049 (N.D. Cal. 2016).

The Government's second claim is not supported by Ninth Circuit or Supreme

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[2] *See,* Supplemental Brief for the United States at 22-23, *Johnson,* No. 13-7120.

Court case law. It is true that, on its face, *Johnson* dealt only with ACCA's residual clause. But virtually everyone – including the Government – immediately understood that its holding extended to other statutes. *See, Dimaya,* 803 F.3d at 1115 (*Johnson*'s reasoning applies with equal force to the similar statutory reasoning and identical mode of analysis used to define a crime of violence for purposes of the INA").

Johnson held ACCA's residual clause to be unconstitutionally vague because it combined the indeterminate inquiry of "how to measure the risk posed by a crime" in the ordinary case with "indeterminacy about how much it takes for the crime to qualify as a violent felony." *Johnson*, 135 S.Ct. at 2558. Contrary to the Government's argument, application of this reasoning to similar language contained in other statutes does not implicate *Teague* or create a new principle of constitutional law. *Tanner v. McDaniel*, 493 F.3d 1135, 1144 (9th Cir. 2007). *Teague* does not, as the Government would have it, require a § 2255 petitioner to show that "the Supreme Court has decided a case involving identical facts, circumstances and legal issues." *Butler v. Curry*, 528 F.3d 624, 634 (9th Cir. 2008). An extension of *Johnson's* general holding – *e.g.,* that the residual clause "is vague in all its applications" – to § 924(c)(3)(B) would not create a "new rule" of constitutional law. *Stringer v. Black*, 503 U.S. 222, 229 (1992)(holding that the Supreme Court's conclusion that California's death penalty statute was a "weighing" statute, where the definition of "weighing" had been established in a case involving a Mississippi statute, was not a new rule).

The Government's third claim is simply wrong. While it is true that only the Supreme Court can announce a "new rule" for purposes of § 2255(f)(3), any lower court can determine whether a rule is retroactive. *United States v. Swinton*, 333 F.3d 481, 487 (3rd Cir. 2003); *Fisher v. United States*, 285 F.3d 596, 599-600 (7th Cir. 2002); *United States v. Lopez*, 248 F.3d 427, 431 (5th Cir. 2001).

In arguing otherwise, the Government has relied on *Dodd v. United States,* 545 U.S. 353 (2005). The decision in *Dodd,* however, said nothing to dispel the conclusion any lower court can determine retroactivity. To the contrary, the majority in *Dodd,* "relied on an assumption made by both parties . . . that the decision to make a new rule retroactive for purposes of [§ 2255(f)(3)] can be made by any lower court." *Dodd*, 545 U.S. at 365, n.4 (Stevens, J., dissenting).

In sum, the assumptions underlying the Government's statute of limitations argument are invalid because they are based on a misconception of federal law. The rule in *Johnson* is not limited to ACCA's residual clause. It applies "with equal force to the similar statutory language" used to define a crime of violence in § 924(c)(3)(B) and § 16(b). *Johnson*'s natural extension to these statutes would not, as the Government tries to argue, result in a new rule of constitutional law. Nor is there any requirement that the Supreme Court, as opposed to any other court, make the determination as to *Johnson*'s retroactivity.

The statute of limitations on Chachanko's claim commenced on June 26, 2015, the day the Supreme Court announced its decision in *Johnson*. His motion to vacate is therefore timely under 18 U.S.C. § 2255(f)(3).

B. The Government's argument that Chachanko's § 2255 motion is procedurally barred lacks merit and should be rejected.

Although a prisoner moving for relief under § 2255 must generally raise his claims on direct appeal, he can receive review of a defaulted claim "by showing cause for the default and prejudice from a violation of federal law." *Trevino v. Thaler*, 133 S.Ct. 1911, 1917 (2013). Chachanko's § 2255 motion is not procedurally defaulted because he can establish both cause and prejudice.

1. Chachanko can establish cause to excuse the procedural default of his *Johnson* claim.

In *Reed v. Ross*, 468 U.S. 1 (1984) – a case the Government did not cite – the Supreme Court held that a prisoner can establish "cause" by showing that his claim is "so novel that its legal basis [was] not reasonably available to counsel." *Id.* at 16; *see also*, *Murray v. Carrier*, 477 U.S. 478, 488 (1986)("[W]e note that a showing that the factual or legal basis for a claim was not reasonably available to counsel . . . would constitute cause under this standard."). A claim is not "reasonably available if the Supreme Court decision establishing that claim: (1) explicitly overrules one of the Court's precedents; (2) overturns a longstanding and widespread practice to which the Court has not spoken, "but which a near-unanimous body of lower court authority has expressly approved;" or (3) disapproves a practice that the Court "arguably has sanctioned in prior cases." *Reed*, 468 U.S. at 17 (internal citations omitted).

"By definition, when a case falling into one of the first two categories is given retroactive application, there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a . . . court to adopt the position that [the Supreme Court] has ultimately adopted," and such a case will satisfy the cause requirement. *Id.* This rule protects courts from overly burdensome litigation because otherwise, "counsel on appeal would be obliged to raise and argue every conceivable constitutional claim, no matter how far fetched, in order to preserve a right for post-conviction relief upon some future, unforeseen development in the law." *Id.* at 16 (internal citation and quotation marks omitted).

Chachanko's claim falls within the second *Reed* category. His challenge was novel and hence, unavailable, under the second *Reed* category because *Johnson* overruled a "near-unanimous" body of lower court authority that expressly approved the practice of imposing punishment under the residual clause. *Reed*, 468 U.S. at 17. Starting as early as 1990, when the Ninth Circuit issued its decision in *United States* *v. Sorenson*, 914 F.2d 173, 175 (9th Cir. 1990), the Circuit courts consistently and unanimously rejected vagueness challenges to ACCA.[3] The Supreme Court affirmed this consensus twice – in April of 2007, when it issued its decision in *James v. United States*, 550 U.S. 192 (2007)(rejecting claim that residual clause was unconstitutionally vague), and in 2011, when it issued its decision in *Sykes v. United States*, 564 U.S. 1 (2011)(rejecting vagueness challenge to residual clause).

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[3] *Id.* at 175 (Sorenson's "void for vagueness argument fails also because there is no indication that the sentence enhancement provision at issue is so vague that it grants undue discretion to law enforcement officials. The factors for sentence enhancement under 18 U.S.C. § 924(e)(1) are quite specific."); *see also, United States v. Jackson*, 250 F. App'x 926, 930 (11th Cir. 2007) (rejecting vagueness challenge to ACCA); *United States v. Hudson*, 414 F.3d 931, 936 (8th Cir. 2005) ("We have rejected Hudson's contention that § 924(e) is unconstitutionally vague."); *United States v. Childs*, 403 F.3d 970, 972 (8th Cir. 2005) ("In addition, Childs argues that § 924(e) is unconstitutionally vague. We agree with every other circuit that has considered this argument and hold that it has no merit.") (citing *United States v. Presley*, 52 F.3d 64, 68 (4th Cir. 1995); *Sorenson*, 914 F.2d at 175); *United States v. Harkey*, 116 F.3d 1487 (9th Cir. 1997) (citing *Sorenson* in rejecting ACCA vagueness challenge); *Presley*, 52 F.3d at 68 ("We agree with the Ninth Circuit that . . . 'ACCA is not void for vagueness.'") (citing *Sorenson*, 914 F.2d at 175); *United States v. Veasey*, 73 F.3d 363 (6th Cir. 1995) (unpublished) ("This constitutional argument has been rejected by every Circuit that has considered it . . . The ACCA is not unconstitutionally vague.") (internal citation omitted); *United States v. Powell*, 967 F.2d 595 (9th Cir. 1992) (unpublished) (citing *Sorenson* to reject claim that "the ACCA is void for vagueness because it is difficult to determine whether its prohibitions apply in any particular case"); *United States v. Argo*, 925 F.2d 1133, 1134-35 (9th Cir. 1991) (citing *Sorenson* to reject vagueness argument); *see also United States v. Cowan*, 696 F.3d 706, 708 (8th Cir. 2012) (rejecting argument that career offender residual clause was void for vagueness after *Sykes* and *James* and citing *Childs*, *Presley*, and *Sorenson*); *United States v. Bailey*, 139 F.3d 667, 668 (9th Cir. 1998) (concluding, when construing a state endangerment offense with language similar to the § 4B1.2 residual clause, that "[c]ontrary to the appellant's assertion, Arizona's endangerment statute is not 'vague'. The language is no broader or less certain than that in Guideline § 4B1.2").

After *James* and *Sykes* were decided, federal courts continued to reject vagueness challenges. Some, including the Ninth Circuit, held that such challenges were foreclosed by *James* and *Sykes*. *See, United States v. Martinez*, 771 F.3d 672, 678 (9th Cir. 2014)(rejecting vagueness challenge as foreclosed by *James*).[4]

[4] *See*, *e.g.*, *Denson v. United States*, 804 F.3d 1339, 1344 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1214 (2016) ("In addition, as the government points out in its supplemental brief, prior to *Johnson*, no court had held the residual clause void for vagueness, and indeed the Supreme Court had twice held that the residual clause was not vague."); *United States v. Martin*, 753 F.3d 485, 494 (4th Cir. 2014) (rejecting vagueness challenge to U.S.S.G. § 2K2.1, holding that argument "ha[d] already been rejected by this court and by the Supreme Court"); *United States v. Martinez*, 771 F.3d 672, 678 9th Cir. 2014) (rejecting vagueness challenge as foreclosed by *James*); *United States v. Phillips*, 752 F.3d 1047, 1051-52 (6th Cir. 2014) (vagueness challenge to ACCA's residual clause foreclosed by *Sykes* and *James*); *United States v. Van Mead*, 773 F.3d 429, 438 n.7 (2nd Cir. 2014) (rejecting vagueness challenge to § 4B1.2, citing *Sykes*); *United States v. Blair*, 734 F.3d 218, 223 n.5 (3rd Cir. 2013) (challenge to ACCA residual clause foreclosed by *Sykes*); *United State v. Brown*, 734 F.3d 824, 827 (8th Cir. 2013) (rejecting vagueness challenge to ACCA's residual clause); *United States v. Orona*, 724 F.3d 1297, 1310-11 (10th Cir. 2013) (rejecting vagueness challenge to ACCA residual clause); *Harrington v. United States*, 689 F.3d 124, 137 (2nd Cir. 2012) (even if not waived, vagueness challenge foreclosed by *Sykes*); *United States v. Jones*, 689 F.3d 696, 704-05 (7th Cir. 2012) (rejecting vagueness challenge to the ACCA's residual clause under *James* and *Sykes*); *United States v. Hart*, 674 F.3d 33, 41 n.3 (1st Cir. 2012) (rejecting vagueness challenge, citing *James*); *United States v. Mobley*, 687 F.3d 625, 632 n.7 (4th Cir. 2012) (rejecting vagueness challenge to § 4B1.2, citing *Sykes*); *United States v. Gore*, 636 F.2d 728, 742 (5th Cir. 2011) (rejecting vagueness challenge to ACCA's residual clause as foreclosed by *James*).

Although these decisions dealt with ACCA's residual clause, their reasoning applied equally to § 16(b) and § 924(c)(3)(B). The language used in § 16(b) and § 924(c)(3)(B) is not identical to that used in ACCA, but courts had recognized that they used similar terminology. *See, e.g., United States v. Keelan,* 785 F.3d 864, 871 n.7 (11th Cir. 2015); *United States v. Stout,* 706 F.3d 704, 706 (6th Cir. 2013); *United States v. Echeverria-Gomez*, 627 F.3d 971, 976 (5th Cir. 2010). Courts referenced ACCA and career offender holdings in § 16(b) cases and vice versa. *Stout,* 706 F.3d at 706; *Echeverria-Gomez*, 627 F.3d at 976; *United States v. Daye*, 571 F.3d 225, 234 (2nd Cir. 2009); *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 562 (7th Cir. 2008). Thus, the decisions rejecting vagueness challenges to ACCA's residual clause foreclosed an attack on § 924(c)(3)(B)'s residual clause as well.[5]

In its Response, the Government has argued that Chachanko cannot show that raising a vagueness challenge would have been futile. In doing so, it has relied on *Bousley v. United States*, 523 U.S. 614, 623 (1998), as well as several decisions from outside the Ninth Circuit. (Response, doc. 98 at 6-7). The decisions cited by the Government do not, however, support its argument.

In *Bousley*, for example, the Court held that the petitioner's claim under *Bailey*

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[5] As previously noted, the residual clause in § 924(c)(3)(B) is identical to § 16(b)'s residual clause.

v. United States, 516 U.S. 137 (1995), which limited the scope of 18 U.S.C. § 924(c), was not sufficiently novel to establish cause because, as the decision in *Bailey* specifically noted, there had been a conflict among the lower courts as to § 924(c)'s interpretation. *See*, *Bailey*, 516 U.S. at 142 ("The Circuits are in conflict both in the standards they have articulated . . . and the results they have reached . . .")(internal citations omitted). In light of this conflict, Bousley could not show that his *Bailey* claim was foreclosed by an entrenched nation-wide "near-unanimous" body of case law. Without such a showing, the Court rejected his argument that his claim was "futile" under the second *Reed* principle.

The Government's citation to *Ross v. United States*, 2016 WL 2642272 (E.D. Wis., May 16 2016), is unpersuasive as well. In *Ross*, the court failed to discuss the widespread rejection of residual clause challenges at the time the petitioner pleaded guilty and was sentenced. *See, Ross*, 2016 WL 2642272 at *3. The other cases cited by the Government do nothing more than prove the point that, when Chachnko was sentenced in 2007 – and for years afterward – a vagueness challenge to § 924(c)'s residual clause was foreclosed by a "near-unanimous" body of lower court case law. *See, United States v. Cowan*, 696 F.3d 706, 708-09 (8th Cir. 2012); *United States v. Mobley*, 687 F.3d 625, 632 n.7 (4th Cir. 2012)(rejecting residual clause challenge in light of *Sykes*); *United States v. Tichenor*, 683 F.3d 358, 366-67 (7th Cir.

2012)(rejecting residual clause challenge on the ground that the "sentencing guidelines are not susceptible to vagueness challenges).

Chachanko, unlike the petitioner in *Bousley,* faced a uniform set of judicial opinions that upheld the residual clause from constitutional challenge. The futility of challenging § 924(c)'s residual clause was not about the strength of a particular issue or a tactical decision of whether or not to raise a *Johnson*-type claim. It had to do, rather, with the fact that this claim had been rejected by every other federal court to confront the issue. It was only after Chachanko was sentenced and his case became final that the Supreme Court reversed the tide of judicial opinions and found the residual clause vague. Under these circumstances, there can be no doubt that Chachanko has established cause under *Reed.*

2. Chachanko can establish prejudice because he is factually innocent of possessing a firearm in violation of 18 U.S.C. § 924(c).

To convict a defendant of using a firearm in violation of § 924(c), the Government must prove the following elements beyond a reasonable doubt: (1) that the defendant committed a crime of violence and (2) that the defendant used a firearm during and in relation to that crime of violence. *See,* Ninth Circuit Model Criminal Jury Instruction § 8.71 (2010). Whether a particular offense is a crime of violence is a question of law that is determined by the court. *Id.* (citing, *United States v. Amparo*, 68 F.3d 1222, 1226 (9th Cir. 1995).

Chachanko can establish prejudice to excuse his procedural default because the predicate supporting his § 924(c) conviction – Hobbs Act robbery – does not qualify as a crime of violence. Prejudice is established when a § 2255 petitioner shows "a reasonable probability" that, but for the complained of error, "the result of the proceeding would have been different." *Vansickle v. White,* 166 F.3d 953, 958-59 (9th Cir. 1999). Chachanko can easily meet this standard.

3. Failure to entertain Chachanko's § 2255 motion will result in a "fundamental miscarriage of justice ".

Chachanko is also entitled to relief if he can show a "fundamental miscarriage of justice." The Government has argued that he cannot make such a showing because "a defendant cannot be actually innocent of a noncapital sentence." This argument, whatever its merits, fails to recognize that Chachanko's § 2255 motion alleges that he is innocent of the § 924(c) offense itself, not that he is factually innocent of a sentencing enhancement. His claim, therefore, is governed by the standard in *Schlup v. Delo*, 513 U.S. 298 (1995). Under that standard, a petitioner's procedural default can be excused on a showing that the claimed error "probably resulted in the conviction of an innocent person." *Id.* at 327.

Because the residual clause is unconstitutional and because Hobbs Act robbery does not constitute a crime of violence under § 924(c)'s force clause, Chachanko can meet this standard. Hence, his procedural default can be excused under *Schlup.*

C. The offense of Hobbs Act robbery cannot support a conviction for using or carrying a firearm in furtherance of a crime of violence in violation of § 924(c).

1. Hobbs Act robbery does not qualify as a crime of violence under § 924(c)(3)(A)'s "force" clause.

In arguing that Hobbs Act robbery qualifies categorically as a crime of violence, the Government points to the statutory language of § 1951(b)(1). It asserts that this language – *e.g.,* "the unlawful taking or obtaining of personal property from the person or presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury" – conclusively shows that Hobbs Act robbery requires "the use or threatened use of force or violence." But statutory language, standing alone, does not necessarily establish that the prohibited conduct will qualify as a crime of violence under the standard set forth in *Johnson(Curtis) v. United States,* 559 U.S. 133 (2010).

In *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016), for example, the Ninth Circuit held that Massachusetts's armed robbery statute does not define a "violent felony" under ACCA. Under Massachusetts law, a robbery can be committed in two ways – "by force and violence" or "by assault and putting in fear." Although "[t]he notion that robbery is not a "violent felony" may seem "counterintuitive to say the least," *Parnell,* 818 F.3d at 982 (Watford, J., concurring), the *Parnell* court had little difficulty determining that Massachusetts armed robbery did not qualify as such under *Johnson(Curtis).* In coming to this conclusion, it surveyed Massachusetts case law and determined that its armed robbery statute does not require "the use, attempted use, or threatened use of physical force." *Id.* at 981.

Similarly, in a case out of this district, Judge Watters determined that Michigan unarmed robbery does not qualify as a crime of violence under USSG § 4B1.2(a)(1)'s force clause. *See, United States v. Ervin,* No. CR-13-23-BLG-SPW, doc. 82. Under Michigan law, a person commits unarmed robbery if he commits a theft "by force and violence, or by assault or putting [the victim] in fear." Mich. Comp. Laws § 750.530. At first glance, one would assume that a violation of § 750.530 qualifies as a crime of violence, but Judge Watters determined otherwise. She concluded that "[u]narmed robbery under Michigan law is not a crime of violence under the elements clause of the career offender guideline." (Order, doc. 82 at 27).

The Hobbs Act uses similar language to that contained in the statutes at issue in *Parnell* and *Ervin*. All three statutes use the words "force," and "violence." Under the Hobbs Act, one can commit a robbery by putting the victim in "fear of injury." The Michigan and Massachusetts statutes define a robbery as a theft committed by "assault or putting in fear." As with those statutes, one "cannot take the language of [the Hobbs Act] statute at face value." (Order, doc. 82 at 25).

Citing *United States v. Howard,* 2016 WL 29619778 (9th Cir., July 24, 2016), the Government maintains that the Ninth Circuit has "categorically held" that Hobbs Act robbery qualifies as a crime of violence under the force clause in § 924(c)(3). This assertion is wrong. In *Howard*, the court specifically refused to take a position on whether or not Hobbs Act robbery can qualify as a crime of violence under *Johnson(Curtis)*. In footnote 1 of its opinion, the *Howard* court stated:

> This circuit has held that crimes that require only a *de minimis* use of force do not qualify as crimes of violence under USSG § 2L1.2. *See, United States v. Dominguez-Maroyoqui*, 748 F.3d 918, 921 (9th Cir. 2014)(assault statue criminalizing "any force whatsoever against a federal officer" does not categorically require "violent force capable of causing physical pain or injury"); *United States v. Flores-Cordero*, 723 F.3d 1085, 1088 (9th Cir. 2013)(resisting arrest statute criminalizing even a "minor scuffle" did not qualify as a crime of violence); *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016)(Massachusetts armed robbery statute criminalizing any level of force as long as the victim is aware of the act did not qualify as a crime of violence under the Armed Career Criminal Act). Howard does not argue that Hobbs Act robbery may be accomplished through *de minimis* use of force, and we take no position on that issue or the applicability of these precedents to Hobbs Act robbery.

Howard, 2016 WL 3470070 at *1, n.1(emphasis added).

The Second Circuit recently overruled prior precedent in light of *Johnson(Curtis)* and *Johnson* to hold that " a first-degree robbery conviction in New

York is no longer necessarily a 'crime of violence' as that term is used in the career offender guideline." *United States v. Jones*, ___ F.3d ___, 2016 WL 3923838 (2ND Cir., July 21, 2016). *Jones* is strongly relevant to Canfield's case because "robbery under the Hobbs Act is . . . robbery as defined by the New York Penal Laws and construed by the courts of that state." *United States v. Nedley*, 255 F.2d 350, 357 (3rd Cir. 1958); *United States v. Aguon*. 851 F.2d 1158, 1164 (9th Cir. 1988)(en banc)(overruled on other grounds by *Evans v. United States*, 504 U.S. 255 (1992)).

"The definitions" in the Hobbs Act "are copied from the New York Code substantially," *Nedley*, 255 F.2d at 355 (citation omitted), and under the New York robbery statute at the time of the Hobbs Act's passage, "the degree of force employed is immaterial," so long as it was "employed either to obtain or retain possession of the property or to prevent or overcome resistance to the taking."

It is a well-established principle of statutory construction that when one jurisdiction adopts the statute of another jurisdiction as its own, there is a presumption that the construction place upon the borrowed statute by the courts of the original jurisdiction is adopted along with the statute and treated as incorporated therein." *Aguon*, 851 F.2d at 1164. Thus, when Congress adopted New York's definition of robbery in passing the Hobbs Act, it adopted a definition that covers any forcible taking; and, as *Jones* confirms, a forcible taking can be accomplished without the "violent force" required under *Johnson(Curtis). Jones,* 2016 WL 3923838 at *5. Because Hobbs Act robbery is identical to New York robbery in that neither offense requires "violent force," it cannot qualify as a crime of violence under § 924(c)'s force clause.

The Government relies on *United States v. Castleman*, 134 S.Ct 1405 (2014), to support its argument that Hobbs Act robbery qualifies as a crime of violence under § 924(c)'s force clause. Its argument in this regard fails to recognize that the Supreme Court has announced differing interpretations of the term "physical force."

In the context of § 924(c), "the phrase 'physical force' means violent force – that is force capable of causing physical pain or injury to another person." *Johnson(Curtis),* 559 U.S. at 140. This definition excludes minor uses of force which are generally prosecuted as a misdemeanor. As the Seventh Circuit noted in an opinion cited with approval in *Johnson(Curtis)*, it is "hard to describe . . . as 'violence' a squeeze of the arm that causes a bruise." *Flores v. Ashcroft*, 350 F.3d 666, 670 (2003); *Castleman*, 134 S.Ct. at 1412.

In *Castleman*, the Court held that, in the context of domestic violence, the term "physical force" has a different meaning than that enunciated in *Johnson (Curtis)*. The defendant in *Castleman* had been charged with violating 18 U.S.C. § 922(g)(9), which forbids persons who have been convicted of "a misdemeanor crime of domestic violence" from possessing a firearm. In upholding the defendant's conviction, the Court held that *Johnson(Curtis)*'s definition of physical force did not apply in the domestic violence context. "Misdemeanor crimes of domestic violence," unlike "violent felonies," often involve acts that "one might not characterize as 'violent.'" *Castleman*, 134 S.Ct. at 1411. They typically involve minor physical insults such as "pushing, grabbing, shoving, pinching, biting [and] hair pulling." *Id.* at 1412. In light of this recognition, the Court refused to incorporate *Johnson(Curtis)*'s meaning of physical force into the definition of "misdemeanor crime of violence." *See also, Voisine v. United States*, 2016 WL 3461559 at *5-6 (June 27, 2016)(defining "use" in the domestic violence context to include reckless conduct).

The logic and language of *Castleman* make clear that the statutory interpretation of § 924(c) and the firearm prohibition in § 922(g)(9) must be undertaken separately. To qualify as a misdemeanor crime of violence, an offense need only require proof that the defendant "engaged in the type of conduct that supports a common-law battery conviction." At common law, the element of force in the crime of battery was "satisfied by even the slightest offensive touching." *Castleman*, 134 S.Ct. at 1410 (citing *Johnson(Curtis)*, 559 U.S. at 139). In *Johnson(Curtis)*, however, the Court declined to read the common law meaning of "force" into ACCA's definition of "violent felony," because it found it a "comical misfit with the defined term." *Id*. (citing *Johnson(Curtis)*, 559 U.S. at 145).

Although a common law battery may "'be committed by administering a poison or by infecting with a disease, or even by resort to some intangible substance,' such as a laser beam," *Castleman*, 134 S.Ct. at 1414-15, the *Johnson(Curtis)* concept of force does not encompass such indirect applications. *United States v. McNeal*, 818 F.3d 141, 156 (4th Cir. 2016); *United States v. Torres-Miguel*, 701 P.3d 165, 168-69 (4th Cir. 2012); *United States v. Garcia-Perez*, 779 F.3d 278, 284 (5th Cir. 2015)(crime that can be committed by poison does not require "use of force"); *White v. Lynch*, 807 F.3d 463, 469-70 (1st Cir. 2015); *Villanueva v. United States*, ___ F.Supp. 3d ___, 2016 WL 3248174 at *12 (D. Conn. June 10, 2016). The Government's argument that § 924(c)(3)(A)'s "use of force" requirement can be satisfied by its indirect application rests on a misunderstanding of *Castleman*.

The Government fails to appreciate that in *Johnson(Curtis)*, the Court explicitly and conclusively rejected the contention that ACCA's definition of "violent felony" should be read broadly to include the common law meaning of "physical force." *Johnson(Curtis)*, 559 U.S. at 139-40. Under common law, "force" can include acts such as poisoning because the "common-law concept of 'force' encompasses even its indirect application." Force for purposes of *Johnson(Curtis)*, however, refers to "force exerted through concrete bodies." It necessitates the use of physical force against the person of another. As such it does not include acts, that although harmful, do not involve direct application of physical force. *Garcia-Perez*, 779 F.3d at 284; *Torres-Miguel*, 701 P.3d at 168-69; *White*, 807 F.3d at 469-70; *Villanueva v. United States*, 2016 WL 3248174 at *12.

In sum, *Castleman*'s definition of force is irrelevant in this case because it can be satisfied by a degree of force that supports a common-law battery – a standard that was explicitly rejected in *Johnson(Curtis)* as "a comic misfit." To constitute a "crime of violence" under § 924(c), an offense must have "as an element the use of [violent] physical force against the person or property of another." An offense that can be committed by using only a *de minimis* amount of force or by causing bodily injury indirectly without the use of physical force, can qualify as a "misdemeanor crime of domestic violence" for purposes of the firearm ban in § 922(g)(9). But it can never qualify as a "crime of violence" under § 924(c)'s force clause.

2. The residual clause in § 924(c)(3)(B) is unconstitutionally vague.

In *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), the Ninth Circuit held that the residual clause in 18 U.S.C. § 16(b) is unconstitutionally vague because it suffers from the same infirmities as ACCA's residual clause. *See also, United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015); *Shuti v. Lynch*, ___ F.3d ___, 2016 WL

3632539 (6th Cir., July 7, 2016); *United States v. Gonzalez-Longoria*, 813 F.3d 225, reh'g en banc granted, 815 F.3d 189 (5th Cir. 2016). Although the identical residual clause language is used in § 16(b) and § 924(c)(3)(B), the Government claims that § 924(c)(3)(B) is not unconstitutionally vague because: (1) the language in § 924(c)'s residual clause is "narrower" than the language stricken in *Johnson* and *Dimaya*;" (2) section 924(c)(3)(B) omits ACCA's list of enumerated offenses; and (3) the Supreme Court has not "repeatedly" failed to construe § 924(c)(3)(B) in a "principled and objective" way. The *Dimaya* court considered and rejected most, if not all, of these arguments, which apply equally to § 16(b).

The Government argues that the language in § 924(c)'s residual clause is "narrower" than that contained in ACCA because § 924(c) focuses on the risk that "force" will be used in committing the offense rather than the "general risk that injury might arise from anything done by the defendant." (Response, doc. 98 at 23). This distinction, the Government claims, renders the risk analysis somehow less uncertain.

This same argument can be made with respect to § 16(b), however. Both § 924(c) and § 16(b) define a "crime of violence" as a crime that "by its nature, involves a substantial risk that physical force . . . may be used in the course of committing the offense." Whether or not this language is narrower than that used in ACCA, one is hard pressed to see how it makes a meaningful difference – a marginally narrow abstraction is an abstraction all the same. As the Supreme Court pointed out in *Johnson,* assessing the level of risk in an ordinary burglary is an entirely speculative enterprise. It is just as easy to imagine a burglar who invades an unoccupied home and flees after hearing someone approaching as it is to imagine one who invades an occupied home at night. *Johnson*, 135 S.Ct. 2558. As with ACCA, § 16(b) and § 924(c)'s residual clause fails to provide a reliable way to choose between these competing accounts regardless of their focus on the risk that force may be used. *Id.* In both cases, a judge is required "to imagine how the idealized ordinary case of the crime subsequently plays out." *Id.* at 2557-58.

The Government goes on to argue that § 924(c)'s residual clause is narrower than ACCA's because "it has a temporal component that § 924(e) is lacking." This argument ignores the fact that both statutes are subject to the "same mode of analysis." Both are subject to the categorical approach, which demands that courts look to the elements and nature of the predicate offense rather than its underlying facts. In either case, courts must decide what a "usual or ordinary violation" entails and then determine how great a risk of injury that "ordinary case" presents. When applied to § 924(c)'s residual clause, the categorical approach is subject to all the constitutional defects identified in *Johnson.*

The Government's "temporal component" argument is, in any event, foreclosed by Ninth Circuit precedent. In *United States v. Amaparo*, 68 F.3d 1222, (9th Cir. 1995), the Ninth Circuit rejected the defendant's contention that the question as to whether an offense is a crime of violence "is a question of fact for the jury to decide, and not a question of law for the judge." *Id.* at 1224. In doing so, it confirmed that "this circuit has adopted a categorical approach to determining which offenses are included under § 924(c) as 'crimes of violence' obviating the need for fact finding by the jury." *Id.* And while the Government attempts to distinguish § 924(c) and § 16(b) on the basis of when the crime was committed, the Ninth Circuit has also rejected that distinction, noting that "our categorical approach applies regardless of whether we review a current or prior crime." *United States v. Piccolo*, 441 F.3d 1084, 1086-87 (9th Cir. 2006). Thus the Government's argument effectively asks this Court to do what it has no authority to do – overturn binding Ninth Circuit precedent.

The Government's argument regarding the four enumerated crimes preceding ACCA's residual clause was addressed in *Dimaya.* The existence of a prefatory list of examples may be confusing, but it was not determinative of the outcome in *Johnson.* The Court's "wide-ranging inquiry" holding was the "more important" aspect of its holding. *Johnson*, 135 S.Ct. at 2557, 2661. At any rate, as the *Dimaya* court recognized, § 924(c)'s residual clause may be more vague than ACCA's *because* it is not preceded by a list of enumerated crime. "[T]hey provide at least some guidance as to the sort of offense Congress intended for the provision to cover." Section 924(c)(3)(B), "by contrast, provides no such guidance at all." *Dimaya,* 803 F.3d at 1118, n.13.

The *Dimaya* court considered the Government's argument that § 924(c), unlike ACCA, has not generated widespread confusion or proven unworkable in practice. *Dimaya*, 803 F.3d at 1119. As that court pointed out, this argument ignores the realities of judicial review. One "can discern very little regarding the merits of an issue from the composition of the Supreme Court's docket." *Id.* And, at any rate, the Government's argument confuses correlation for causation. The fact that the Supreme Court has decided more ACCA cases than § 924(c) cases does not indicate that it believes the latter statute to be any more capable of consistent application.

The Government's reliance on the cabining footnote in *Dimaya* is also unpersuasive. *Dimaya* held that § 16(b) is unconstitutionally vague because, like ACCA's residual clause, it "requires courts to (1) measure the risk by an indeterminate standard of a judicially imagined ordinary case, not by real world-world facts or statutory elements and (2) determine by vague and uncertain standards when a risk is sufficiently substantial." *Dimaya*, 803 F.3d at 1120. While the *Dimaya* court made clear that its holding should not be taken to extend beyond the scope of the facts before it, that does not mean that the reasoning of its decision cannot be applied elsewhere. Here, as in *Dimaya*, the "minor distinctions between the text of [ACCA's residual clause] and that of [§ 924(c)(3)'s residual clause]" fail to "undermine the applicability of *Johnson*'s fundamental holding to this case." *Id.*

Finally, the Government argues that Chachanko "cannot bring a vagueness challenge because § 924(c)(3)(B) is not unconstitutionally vague as applied to him." This argument was squarely rejected in both *Johnson* and *Dimaya*. *Johnson*, 135 S.Ct. at 2561-62; *Dimaya*, 803 F.3d at 1119, n.15.

In sum, *Dimaya* compels the conclusion that *Johnson* applies to § 924(c)(3)(B)'s residual clause. *See, United States v. Bell*, 2016 WL 344749 (N.D. Cal. 2016); *United States v. Lattanaphom*, 2016 WL 393545 (E.D. Cal. 2016); *United States v. Luong,* 2016 WL 1588495 (E.D. Cal. 2016); *United States v. Edmundson*, 2015 WL 9311983 (D. Md. 2016); *United States v. Baires-Reyes*, 2016 WL 3163049 (N.D. Cal. 2016). Although several courts have declined to extend *Johnson* to § 924(c)(3)'s residual clause, none of these courts are in the Ninth Circuit. A few of these courts have relied on the conclusion that § 924(c)(3)'s residual clause, unlike ACCA's, does not require application of the categorical approach. *See, e.g., United States v. Checora*, ___ F.Supp.3d ___, 2015 WL 9305672 at *9 (D. Utah, December 21, 2015). But that is not the law in the Ninth Circuit.

III. Conclusion

For all the reasons argued both here and in his § 2255 motion, Chachanko's sentence "was imposed in violation of the Constitution or the laws of the United States." Chachanko is entitled to relief under 28 U.S.C. § 2255 and the sentence imposed in connection with his § 924(c) conviction should be vacated.

RESPECTFULLY SUBMITTED this 9th day of August, 2016.

/s/David F. Ness

CERTIFICATE OF SERVICE - L.R. 5.2(b)

I hereby certify that on August 9, 2016, a copy of the foregoing document was served on the following persons by the following means:

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1. CLERK, U.S. DISTRICT COURT

2. BRYAN T. DAKE
   Assistant United States Attorney
   United States Attorney's Office
   Counsel for the USA

3. YURI CHACHANKO
   Defendant/Movant

/s/David F. Ness